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PRINCIPLES OF LEGISLATION

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This is a period of revaluations. The crucial tests that have been imposed within the last year upon so many nations by the stress of war have probably led most of us to question and perhaps to doubt old, and as we had believed, firmly rooted tenets and dogmas. It is true that political science has long since abandoned the eighteenth century confidence in general theories and deductions; but there were many who had cherished at least a loyalty to certain fundamental political ideals: individualism, self-government, democracy; and even these are challenged by newly emphasized factors of strength and weakness that seem to determine the fate of nations. It behooves us now to be cautious in drawing premature conclusions from abnormal conditions, and to retain some faith in principles that have not been demonstrated to be unsound.

Amidst the confusion of political values we have all been impressed with the importance and with the achievements of technique, and we may be tempted to insist upon high technical standards in government as an undisputable political ideal. Yet

we used to be tolerant of governmental imperfections in the belief that it was the temporary price we paid for more fundamental and enduring political gains, and this seems as yet to be the American political philosophy. Had a commission of economy and efficiency presided over American government from the beginning, it would tax the imagination to think of the millions that might have been saved from waste; but could there have been that spirit of individualism, that glamor of liberty, that made American institutions attractive to aliens coming to this country, and that made possible a national assimilation and consolidation which is without a parallel in history? Surely that is a political asset which no mere technical perfection of government could have won for us, and it warns us not to value the traditional essentials of American institutions too lightly.

Making all due allowance for this consideration, it is all the more necessary to insist upon high standards where the lower standard cannot be accounted for by political exigency or expediency. Concede that in rural districts the prevailing loose type of administrative organization should be continued, that is no reason why modern systems of accounting should not be installed; concede that we do not intend to give the administration the practical monopoly of initiating legislation that it has in Europe, that is no reason why private members should not have every facility to aid in the skilful drafting of measures. Or, putting it more generally, concede that governmental standards cannot be in every respect the highest, it ought still be possible to improve the purely technical processes which no government can dispense with. Where in the choice between two alternatives no political element is involved, there ought to be a united and persistent effort to secure the adoption of the better alternative.

Of all governmental activities legislation is the one in which the demand for high technical standards ought to encounter the least resistance. Loose administration serves distinct purposes and interests; defective legislation does not or only to a negligible degree. Legislation claims to make contributions to the body of jurisprudence which from times immemorial has been accounted a product of professional skill and learning, and will

therefore always conform at least to the outward show and semblance of juristic technique. Practically every statute that we know of has been drawn up by a trained official or by a lawyer; clerical routine may master pure matters of style, but would be inadequate for the task of creating legally available rights and legally enforceable obligations which presuppose a fitting of the new piece of legislation into the mass of existing statute and common law. Perhaps the term judicial availability would best designate the technical or scientific quality of legislation; and this is consistent with purposes of the most diverse kind and nature. A clear comprehension of the difference between legislation as a branch of jurisprudence and legislation as a matter of policy is therefore an indispensable condition of a proper understanding of problems of law making.

It might seem that this distinction should have gained in emphasis and practical effect through the specifically American doctrine of judicial power, and the general impression is probably that America more than any other country has brought legislation under the control of jurisprudence; but I think that a careful analysis of the past history of the judicial treatment of the due process clause shows that this is not the case, and I believe that it can also be shown that the further development of constitutional law along its present lines is not likely to result in the building up of a system of principles of legislation.

The supreme court has refused to define the meaning of due process, but its underlying philosophical concept is not likely to be disputed: it stands for the idea that it is not the mere enactment of a statute in constitutional form that produces law, but the conformity of that enactment to those essentials of order and justice which in our minds are indispensable to the nature of law. Viewed in the light of history, these essentials are few, and the legislature is not apt to violate them except through inadvertence or in the heat of political passion. There consequently appeared to the original framers of the American constitutions as little need of insuring by express constitutional mandate the general conformity of statute to law, as is now felt in Great Britain or in her colonies. Indeed they seemed willing to concede that public exigency might now and then demand arbitrary action:

thus Massachusetts, while guaranteeing in her bill of rights the application of the "law of the land" and of "standing laws," yet recognized the possibility of the suspension of laws, only requiring that it be done by the legislature or by its authority; even the taking of property for public use (without reference to compensation) might be sanctioned by the legislature; only bills of attainder and ex post facto laws, sometimes also retrospective laws, were specifically and absolutely forbidden. Massachusetts in this respect is typical; the term "due process" does not even occur in the first constitutions of the original States. The specific clauses of the bills of rights practically all dealt with issues that at one time or another had been the subject of political and constitutional controversy, and they were by no means looked upon as merely circumscribing the idea of government by law; thus in guaranteeing trial by jury, it was well understood that certain phases of law could and would be duly administered without it.

But the judicial power to declare laws unconstitutional gradually and perhaps inevitably introduced the idea of inherent limitations upon the legislative power. Practically all the early applications of that idea turned upon the protection of vested rights, which had for over one hundred years been treated as the cardinal principle of natural law wherever natural law had been systematized. Thus far then, inherent limitations merely enforced an almost universal dictate of justice. It was a very different matter to insist in the name of the idea of due process upon a demarcation of spheres of government and liberty, upon an immunity of individual action from legislative control. Until the middle of the nineteenth century no such idea was suggested by lawyers, courts or text writers. The prohibition legislation of the fifties gave the first opportunity of asserting such a liberty, but the slight attempts made in that direction found practically no judicial response. The second opportunity was given by the Granger legislation of the seventies, the first great attempt to control the traditional economic freedom; and now the supreme court, while sustaining the legislative power over railroads and warehouses, spoke in approving terms of the immunity of private business from legislative control.

This idea then grew and established itself in connection with the attacks upon labor legislation from about the middle of the eighties, and produced the doctrine of a constitutional right of freedom of contract. The true nature of this judicial control revealed itself in the decision of the New York court of appeals which annulled the first American workmen's compensation law. The point at issue was a rule of liability, a subject closely interwoven with the very elements of the concept of law; yet the court suggested an appeal to the people to sanction the principle which it declared violative of the guaranty of due process. It is well known that the appeal has been successfully made and that the court of appeals has bowed to the popular verdict. (Jensen vs. So. Pac. R. Co., 215 N. Y. 514.)

Obviously, the court of appeals believed that the people of the State of New York in adopting their constitutions had intended to place certain fundamental notions of right and justice beyond the reach of the legislative power, and that the due process clause served that purpose; but that in the hands of the people themselves these notions were legitimate subjects of change with the progress of social and economic thought. This view also explains the apparent paradox that the same words bear a different construction in the state and in the federal constitution. The situation is best understood when we say that the court in the name of due process enforced fundamental policies and not merely what the United States supreme court had designated as cardinal and immutable principles of justice.

This point of view should control the interpretation of much that goes in America under the name of constitutional law. The decisions enforcing so-called inherent limitations are among the most loosely reasoned in our entire case law. There is much talk about inalienable rights on the one side and about the police power on the other; as the case may be, either denunciation of the arbitrary will of the legislature, or disclaimer of judicial superiority of judgment or power of control; practically the only criterion that is suggested is that of reasonableness, and to talk of reasonableness, when we are in search of a rule of law is to offer us when we are asking for bread, I should not say a stone, but a piece of India rubber. From the point of view of legal

science it would be difficult to conceive of anything more unsatisfactory.

But the point of view should be an estimate of constitutional organs dealing with law in transition. For nearly a century economic freedom had reigned almost unquestioned. Labor legislation was the most conspicuous manifestation of a new era of regulation of private business. The new legislation was in many respects experimental and badly worked out, some of it was premature. Legislative methods failed to command that degree of popular confidence which would be willing to dispense with further control if such control was available, and in America it was. The conservative sense of the community demanded a judicial check which had to operate under the guise of legal and not political control. The idea of a constitutional policy and corresponding rights and limitations was thus readily entertained not only by the courts, but by the great preponderance of public and professional opinion, and to a very considerable extent this opinion prevails today.

In fulfilling an essentially political function the courts were handicapped by two special difficulties: in the first place, freedom of contract was obviously not an unqualified right like freedom of religion, but necessarily required so many exceptions that in attempting to formulate it, it was impossible to avoid fluctuation and contradiction; in fact the entire concept is so vague as hardly to present a justiciable issue;—in the second place, the exercise of the judicial power was not called for until the very fact of legislative enactment showed that the strength of the constitutional policy was declining. Inevitably, therefore, this method of control created friction and dissatisfaction, increased perhaps rather than diminished by the consciousness that in a popular government courts must eventually yield to popular policies, and certainly increased by the indefensible narrowness of view displayed in some decisions.

Extreme indefiniteness however appears in the light of a wise avoidance of irrevocable conclusions, if we apply to this phase of constitutional law as a whole the test of political performance. The legal weakness of the labor decisions constitute their saving grace. No constitutional right is asserted without placing in

convenient juxtaposition a saving on behalf of the public welfare. No rule has been formulated in such a manner as to embarrass an honorable retreat, and if an inconvenient precedent is encountered there is little hesitation in overruling it. Even the brief period of thirty years, during which the courts have enforced constitutional policies, has been sufficient to demonstrate that any apprehension of a permanent hindrance on their part to any phase of legislative progress is groundless.

Upon a large view, then, of our constitutional history we are impressed with the fact that in assigning a controlling function to the courts we have after all not altered the universal character of constitutional issues: in America as well as in other countries they are, in the main, issues of power and policy, and the conformity of legislation to fundamental principles of law is too technical and inconspicuous an issue to arouse attention or discussion. As a matter of theory the proclamation of due process as a paramount and mandatory requirement might perhaps have been expected to identify constitutional law with scientific canons of legislation, but practically it has had no such result. The number of cases in which such canons have been discussed is insignificant; and not infrequently courts have altogether failed to deal with the real principle involved and calling for protection. Upon a sober view of the relation of courts to statute law this is not surprising.

The common law is a system of principles and the great majority of these principles have had their origin and formulation in judicial opinions written with a single view to searching out the truth. Legislation cannot claim to be an expression of pure principle, but of necessity embodies a considerable amount of discretion, expediency and compromise.

Even where legislation is enacted to remove common law defects and to substitute a superior rule, the difference remains that the common law was put forward in the name and in the form of principle, while the statute is put forward in the name of the sovereign will and in the form of a command: "stet pro ratione voluntas." In England the courts, after a period of free construction which subordinated legislation at important points to principles of equity, came to accept acts of parliament

loyally according to the letter of the legislative mandate and without questioning the validity of its underlying reason. Principles of legislation became subject to judicial cognizance only for purposes of interpretation, where the statute was ambiguous, and the principle of a clear statutory provision was entirely beyond judicial discussion. In practical effect this means that principles of legislation are without forensic or professional status or interest.

In America the theory of implied limitations altered this situation, but not nearly as much as might have been expected. The habit of enforcing implied limitations grew very slowly, and professedly remained confined to extreme cases; it was only the violation of a minimum standard of reasonableness or principle that would be deemed a justification for declaring a statute unconstitutional, and the courts never claimed a praetorian power of aiding, supplementing or correcting statute law. In the nature of things it will happen only rarely that a statute will fall below minimum standards, so that the courts will find occasion to set their own standards against those of the legislature. When they do so a judicial principle of legislation is at least by implication laid down; but it is obvious that with a scope of judicial review so limited the law reports can hardly be expected to be a repository of principles of legislation, as they are of principles of common law, and that a system of principles based upon judicial authority alone must be extremely fragmentary.

Under these circumstances it becomes impossible to identify scientific legislation with constitutional law. The fact however that American courts have undertaken to deal with the validity of legislation on general grounds remains an advantage which we should not neglect and which supplies us with material for study that is not available in other systems. The poverty of case law is offset to some extent by the greater significance of each case in the light of the history of which it forms a part. The operation of ordinary rules of law is difficult to trace, since the great mass of private acts and relations upon which they bear is wrapped in obscurity; the success or failure of principles of legislation appears however in the history and the enforcement of statutes, which are matter of public record. We may thus

be in a position to substitute for the lacking authority of judicial decision, and sometimes to set against it, the irrefutable testimony of experience and of facts of common knowledge. The history of legislation will teach us more about its principles than judicial doctrines pronounced with regard to legislation. A few examples will illustrate this observation.

In the eighties of the last century a number of States undertook to suppress the oleomargine industry entirely. Instead of merely dealing with imitations of butter, they extended their prohibitory legislation to substitutes. This legislation was successfully contested in New York, but was sustained by the federal supreme court in 1887. According to commonly prevailing criteria we should therefore conclude that by preponderance of authority no fundamental principle of legislation is violated by outlawing a valuable article of food, if the legislation deems mere restrictive regulation ineffectual to stop fraudulent practices. Yet we find that with all other conditions remaining practically the same, this type of legislation has been unable to maintain itself, and notwithstanding the judicial support has disappeared from the American statute books.

A chapter from the history of gambling legislation tells a similar story. It is matter of common knowledge that stock and produce exchanges are used for purposes of speculation which is in effect gambling. Proceeding upon the theory that a large proportion of option sales and sales for future delivery are of this character, legislation has been enacted both abroad and in this country making these transactions altogether illegal. Illinois thus made it a misdemeanor to make options of purchase or sale of any commodity, and California placed a provision in her state constitution making void all contracts for the sale of shares of stock on margin or to be delivered at a future day. This legislation was likewise contested and again the supreme court of the United States sustained the sweeping prohibition both of the criminal code of Illinois and of the constitution of California. Again it was thus recognized on the highest authority that no fundamental principle is violated by the entire suppression of transactions which may serve valuable and legitimate interests provided the legislature believes that certain

dangers to the public can not be otherwise successfully dealt with. Prohibition thus having been vindicated from the point of view of constitutional law, it is instructive to note its failure to vindicate itself by the test of practical experience. In order to protect legitimate business transactions it was found necessary in Illinois to amend the criminal code, and in California to amend the constitution, and the law was brought into harmony with the contentions that had failed to prevail in court. It is hardly necessary to add that prohibitory laws of similar type have long since disappeared from foreign statute books.

It is entirely proper to set against a doctrine of constitutional law resting upon a legal decision, even of the supreme court, the striking consensus of widely separated jurisdictions in abandoning policies imprudently adopted and which experience proved to be intolerable. Only a theory of judicial infallibility can continue to treat prohibitions thus discredited as valid forms of exercise of legislative power. Why, in the light of the history of legislation should we not accept the principle that functions and activities of genuine economic value must not be destroyed by reason of the possibility of their abuse where absolutely vital interests of the community are not at stake, but that the danger of abuse must be met by regulative or restrictive measures? This indeed is but a principle of common sense. It needs to be emphasized only because it failed to receive the supreme judicial sanction. And while in a sense obvious and commonplace, it may still be claimed for the principle that it has a more tangible content than mere phrases about liberty and property, reasonableness and the public welfare.

The history of the criminal enforcement of the Sherman law is likewise instructive. In 1890 Congress created the hitherto unknown offense of monopolizing an industry. It did not define the offense, nor has any one since been able to define it. Whether an organization like the Harvester Company is a contribution to the economic efficiency of the nation or a violation of the law of the land is a question which the Supreme Court takes two years to consider, and the erroneous private decision of which subjects to the risk of fine and imprisonment. Such

uncertainty in a penal statute, the Supreme Court has held, does not render it unconstitutional. Common sense tells us that such legislation is contrary to sound principle, and history confirms common sense, for the criminal enforcement of the Sherman law, backed by all the financial and legal resources which a powerful government could command, has been an almost absolute failure. What success the government has had in enforcing the act, has been through the power of proceeding in equity which was an afterthought and almost an accident in the preparation and enactment of the law. And even this phase of the law is likely to be superseded by the more specific methods provided by the legislation of 1914. If the constitutions demand certainty and particularity in indictments, precisely the same principle demands common certainty in the statutory definition of an offense. The strong demand for a codification of the criminal law both in America and on the continent of Europe was largely inspired by the horror of undefined offenses which also found expression in the French Declaration of Rights of 1789. Unjust to the defendant, the vagueness of a criminal prohibition is also disadvantageous to the government, for the sense of the injustice of the law will lead both juries and courts to minimize or neutralize its effect, and will diminish the vigor and confidence of official enforcement. The testimony of authorities charged with the administration of labor laws is unanimous to the effect that generic requirements in factory acts are from this point of view undesirable. Again it is the success or failure of statutes, and not the ruling of a supreme court, that should determine the true standard of legislation.

It would perhaps be unfair to call the three examples from the history of legislation which I have given somewhat at length, typical cases. They are exceptionally valuable because they illustrate principles of legislation that have enforced themselves in spite of judicial decisions by the sheer force of their soundness; but to conclude that every sound principle must enforce itself automatically would be to assert that unwisdom or injustice cannot prevail in this world, which would be unwarranted optimism. But the examples illustrate the difference between a principle of legislation and a doctrine of con-

stitutional law, and incidentally show which is theoretically as well as practically the more valuable.

The history of workmen's compensation in New York shows that sound principle may also prevail over judicial doctrine where the final outcome vindicates instead of disproves the validity of legislative action. In any event a pointed issue between principle and constitutional law is exceptional, because legislative good sense will as a rule keep statutes well above the lowest level of performance that courts will tolerate, and because the observance of superior and really adequate standards is not, and it should be added, as a practical matter, cannot very well be insisted upon by the courts. Inferior standards however undoubtedly account for the readiness with which courts have been in the habit of entertaining the plea of unconstitutionality.

It would be a profitable task to examine from this point of view the labor legislation that has appeared to American courts as inconsistent with constitutional rights. While the reasoning of the courts frequently remains unconvincing, and while they operate with doctrines or concepts that cannot stand close analysis or that sooner or later will have to be abandoned, it it also true that many of the statutes annulled hardly deserved a better fate than they met. Very generally labor legislation has failed in one of the most vital principles of sound legislation, namely in the proper correlation of the various elements of a complex situation. Reciprocal obligation is of the essence of employment. A statute enacted at the request of labor interests generally seeks to redress some injustice or grievance; but very often the practice which employers are forbidden to continue has some element of justification in the shortcomings of labor; and a mere one sided prohibition without corresponding readjustments leaves the relation defective with the balance of inconvenience merely shifted from one side to the other. Under such circumstances courts are much inclined to assent to the claim that there has been an arbitrary interference with liberty or a violation of due process, a claim which in that form is untenable. Thus the practice of paying coal miners accord-

ing to weight ascertained after passing the coal mined through a screen in order to eliminate the inferior small size output, appeared to the miners as a grievance which they sought to remove by compelling the weighing of coal before passing it through the screen. This legislation has generally been declared unconstitutional as inconsistent with the freedom of contract; the real objection to the coal weighing acts was that, as the supreme court of Ohio pointed out, the former injustice to the miner was proposed to be remedied by another injustice to the operator whom the law sought to compel to pay the miner irrespective of the quality of work and product. Under the new constitution of Ohio expressly allowing coal weighing legislation, a new law has been enacted upon the recommendation of a commission which provides for the determination of a maximum permissible percentage of impurity, thus seeking to arrive at a fair compromise between conflicting interests; and this legislation the federal supreme court has recently sustained. (Rail River Coal Co. vs. Yaple, 236 U.S. 318.)

Within the last year the supreme court has been criticized for annulling for the second time legislation prohibiting employers from making membership in labor unions a ground of discharge. Probably the last word has not been spoken upon the sacrosanct nature of the right to "hire and fire," as it is called, but no sympathy should be wasted on legislation which seeks to protect a labor union without in the least considering the need of protecting the employer against the abuse of its power. Some time perhaps our legislatures will come to understand that a fair measure for the protection of the right of membership in labor unions involves the recognition of obligations and restraints, and not until then will the regulation of the right of discharge be presented to the courts upon its merits.

The supreme court has not yet passed upon the constitutionality of minimum wage legislation. In the present temper of the court toward social legislation for women a favorable decision is not unlikely; but we shall remain unenlightened as regards a minimum wage for men. Unfortunately, this issue, too, will be presented in an uncorrelated condition: the

English coal mine minimum wage act provides for rules with respect to the regularity and the efficiency of the work to be performed, but a similar provision is lacking in American statutes. A minimum wage logically requires a minimum service or return, and without this element of reciprocity, it is impossible to judge fairly of the justice or injustice of wage regulation. The issue of abstract power is misleading and perfectly barren.

If correlation mean more carefully measured justice, what I should call the principle of standardization stands for the other main objects of law, certainty, stability, and uniformity. More particularly standardized legislation means above all three things: conformity to established scientific truth, a certain constancy in relations and in rates of progression, and the avoidance of excessive or purposeless instability of policy. I cannot here develop these ideas in detail. With regard to the element first stated, a purely practical observation must suffice: legislation has occasion to apply the conclusions of physical and social sciences; but a system of principles of legislation must recognize that the data of those sciences are foreign to its own province; a science of legislation should confine itself to two tasks: to work out methods and processes which will place legislators in possession of the fullest available information and facilitate the application of data thus obtained; and to find and establish the most available and effective modes of securing conclusions that have been established by other sciences, in the form of rules of law; the formulation of protected interests as legal rights is a purely technical problem which is of the essence of constructive jurisprudence, and to which thus far practically no systematic thought has been given. The training of a lawyer, while indispensable, is entirely inadequate for this task, as may be readily proved by the drafting defects of statutes "penned" by great judges and lawyers; and it is perhaps at this point that the greatest opportunity presents itself for new and fruitful work.

It is also necessary to guard against misunderstanding when stability of policy is named as one of the important aspects of standardization. Where policies are controverted, it may be

plausibly contended that a ready response to the popular will is preferable to stagnation, and it is perhaps also true that frequent change is in some cases merely the consequence of the American habit of introducing new legislative ideas in the form of tentative statutes which require repeated amendment until a satisfactory form is found. The plea for standardization relates to cases in which instability serves no particular purpose. However controversial the main object of a bill, there are always matters incidental to it upon which there is no strong partisan feeling, and upon which the only legislative desire is to do the right thing. As to this there may be theoretical differences of opinion, but rarely any great practical difficulty in reaching an agreement. There is then every reason why this subsidiary and technical detail of statute law should be determined in a uniform manner, i.e., should be standardized. We should consider it absurd if every statute were to create its own judicial procedure for the litigation of controversies arising under it; yet to a very considerable extent this is done with regard to penal provisions and the machinery of administration, at least in state as distinguished from federal legislation. In France and Germany a simple executory clause is sufficient to make an existing administrative apparatus, together with a highly developed administrative code, available for the carrying of a statute into effect.

It is theoretically possible to standardize administrative clauses of statutes by framing them for each statute upon uniform principles, or better still, upon uniform models; but the simpler method is to codify such clauses as separate acts, by analogy to existing practice and procedure codes, and then incorporate them into statutes by express or tacit reference. Such separate enactment would concentrate upon technical provisions an attention which they rarely receive when they appear as the subordinate detail of the important principal subject matter of a bill, and when at the worst they lend themselves admirably to the perpetration of jokers, and, at the best, follow without much thought previous precedents. Where in exceptional cases, as e.g., in connection with the Sherman law, we can trace somewhat the ori-

gin and growth of penal and administrative provisions, we discover that that part of the law as finally shaped is due far more to accident than to forethought. Even if a particular provision is not intrinsically objectionable, variation is intrinsically undesirable. If subsidiary policies are determined anew for each statute as a matter of habit or because no general rule is available, it means for the legislature the waste and wear of responsibility for new decisions, for the administration, the inefficiency which results from lack of consistent purpose, and for individuals affected, lack of uniformity and therefore something that approaches the deprivation of the equal protection of the law.

The standardization of penal and administrative clauses is indeed one of the most powerful safeguards of justice to individual rights. It is curious to observe that when we compare a particular statute with its enforcement, the administrative standard is more conservative than the legislative standard; while, on the other hand, the legislative standard is more conservative when it is divorced from than when it is incidental to a specific measure. This shows that considerations in favor of individual right will have the slightest chance when a particular policy is under discussion, and the checking influence of its application to personal cases is not operative. Where individual right is weighed against policy on general principles, a fairer and more even balance will be struck. For it will then appear, just as it will appear when sentence is to be pronounced in a particular case, that the carrying out of a controverted policy is not the last and only consideration in a free state, but that excessive powers and exorbitant penalties are not only unwise but unjust, and may violate a higher policy than the one that may be represented in a particular measure. That is why guaranties of individual right are placed in constitutions. The separate codification of administrative clauses will have a similar purpose and effect: it will constitute a statutory bill of rights.

The importance of this matter has been called to the attention of the American Bar Association which has authorized its committee on legislative drafting to prepare a manual of model clauses for draftsmen. This work has been begun and it ought to give a strong impetus to a movement toward this phase of

standardization; its value will depend largely upon the amount of consideration it will receive, for many minds ought to coöperate to bring about acceptable results in legislation. The coöperation that is needed more than any other, is that of the National Conference of Uniform Law Commissioners, the body in which the most careful professional thought is brought to bear upon the discussion of legislative projects.

It is of course the exception rather than the rule that principles of legislation will thus lend themselves to codification or statutory formulation. The equal protection of the law, which is guaranteed by the fourteenth amendment involves the principle of adequate and carefully discriminating classification and differentiation: obviously, this is a matter upon which it is impossible to formulate general propositions of statutory force and character, but to which only an impartial and intelligent survey of a particular legislative problem in its entirety can do justice.

The courts which can control legislation only by annulling it are powerless to enforce the requisite standards, and they can deal effectually only with cases of gross abuse of the legislative power of classification. An examination of constitutional decisions makes it perfectly clear that the judicially enforced standard rarely represents the highest available or practical standard, and it would therefore be vain to look to the courts for adequate principles of legislation; it would be as reasonable to expect the common law to give us an adequate code of private conduct. By the very nature of its function the strictly judicial attitude of mind is not the one most favorable for dealing with complex legislative problems. Courts decide between contentions for the full measure of abstract rights carried to their logical conclusions, unaffected by the possible expediency of indulgence and concession; they deal with human relations in an atmosphere of controversy and extreme self-assertion; they touch life mainly at the point of abnormal disturbance. The function of legislation on the other hand is to prevent controversy, and is therefore dominated by the spirit of compromise and adjustment; it is for this reason that legislative rights are apt to be more qualified than common law rights. The re-

sult is that the principle of judicial rule or justice is the minimum, the principle of legislative rule or justice, the maximum of reciprocal concession. In America this contrast is obscured and modified by a number of factors: the great authority and influence which judicial thought, particularly in constitutional matters, exercises over the legislature through its lawyer members, and which constantly tends to make the constitutional or minimum standard of rights the normal standard for purposes of legislation; the fact that after all the courts represent the highest type of training in our civil service while the legislatures do not; and the spirit of extreme jealousy with which the legislature guards public rights against the apprehended encroachments of privilege and of corporate power, and that has led it occasionally into considerable injustice to private interests. To estimate fairly the relative value of judicial and legislative action in developing principles of legislation, we should study conditions where both are at a fairly equal level of spirit and of performance; even in a matter which appeals so strongly to courts of justice as the allowance of a judicial remedy against administrative action, it will be found that the legislative rule laid down by the Prussian administrative code is more favorable to private right than the practice of American courts.

If it is true that principles of legislation can become operative only through the practice of legislation it should also be recognized that the knowledge, the painstaking care, and the restraint which their application involves, presuppose professional assistance in the preparation of bills, professional in the sense of being trained in the work of statute making, not merely trained in the common law. The establishment of drafting bureaus by state after state will be perhaps the most potent agency in creating high and uniform standards, provided they are permitted to develop and render service in accordance with the importance of their functions.

I am also convinced that here is a great field for constructive work by university law schools and departments of political science; without them the science of legislation must remain inarticulate; for all over the world drafting officials are too busy to elaborate fully the principles upon which they act. The books

of Sir Courtenay Ilbert are the mere beginning of a literature. From the purely professional point of view of preparation for the practice of the law, this study has of course a narrower range of practical application than that of common law principles; but this defect is offset by the wider outlook that it offers, the quite special training in constructive legal thought which it affords, and the great intrinsic interest and importance of its material. It is moreover only by such a study that lawyers will learn to appreciate the fact that it is not judicial thought alone that produces and develops law.

It should not require many words to show the practical value of a recognized system of principles of legislation. Fully elaborated it would mean, that, given a clear understanding of the essential points of a policy, the work of translating that policy into the terms of a statute might be safely left to experts. The results would be a great economy of legislative time and effort; a diminished risk of technical defects, and of what are popularly known as "jokers," and a much greater facility in the working of the popular initiative, if it be thought desirable to continue or expand that form of legislation. The standardizing of legislative methods and provisions should also gradually raise the level of legislative performance and increase popular confidence in the legislature, and ultimately make for a reduction of constitutional provisions and restraints. There is a growing conviction that constitutional limitations are an evil, though as yet a necessary evil, and that the course of true progress is toward a flexible instead of a rigid system, a system of inherent instead of imposed guaranties, which will allow the mobilization of every legitimate legislative power in case of need. No great nation, nor for that matter, any live community, can afford to be tied by dead hands, or to have its policies mapped out generations ahead; but however great the emergency, a free people may well insist that whatever changes may be necessary shall be brought about under observance of that order and with that respect for right and justice which the world knows as law and which we happen to call due process. This is what constitutional government ought to mean, and this can be accomplished only by a system of principles of legislation.